

## **The President Has No Power Unilaterally to Abolish or Materially Change a National Monument Designation Under the Antiquities Act of 1906**

We have been asked by our client, National Parks Conservation Association, whether a sitting President may unilaterally abolish or materially change a national monument that was established by an earlier President under the authority of the Antiquities Act of 1906. The question arises in the context of President Trump’s Executive Order of April 26, 2017 directing the Secretary of the Interior to conduct a review of all national monuments designated since 1996 which are at least 100,000 acres or which the Secretary determines were designated without adequate public input.<sup>1</sup> The Executive Order directs the Secretary to report back to the President and make recommendations “for such Presidential actions, legislative proposals, or other actions consistent with law as the Secretary may consider appropriate to carry out the policy set forth in section 1 of this order.” Section 1 broadly talks about public input, economic growth, the “original objectives” of the Antiquities Act and “appropriately balance[ing] the protection of landmarks, structures, and objects against the appropriate use of Federal lands and the effects on surrounding lands and communities.”

President Trump stated when he issued the Order that “the Antiquities Act does not give the federal government unlimited power to lock up millions of acres of land and water, and it’s time that we ended this abusive practice.”<sup>2</sup> That review will cover some 25 national monuments designated or expanded since 1996.

President Trump said he was particularly eager to change the boundary of Bears Ears National Monument in Utah.<sup>3</sup> President Obama designated that monument primarily at the request of Native American tribes, declaring that the “paleontological resources [there] are among the richest and most significant in the United States” and that the area’s “petroglyphs and pictographs capture the imagination with images dating back at least 5,000 years.”<sup>4</sup> President Trump, however, referred to this monument designation as a “massive federal land grab,”<sup>5</sup> which suggests that the federal government did not already own the land before that event. However, the federal government has owned that land since long before Utah became a state in 1896. While the federal government made land grants to the new State for various purposes,<sup>6</sup> the new State’s constitution, as Congress required, “forever disclaim[ed] all right and title” to federal

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<sup>1</sup> *Review of Designations Under the Antiquities Act*, Exec. Order 13792, 82 Fed. Reg. 20429 (May 1, 2017).

<sup>2</sup> Juliet Eilperin, “Trump orders a review of newer national monuments,” *Washington Post*, April 27, 2017, at A3.

<sup>3</sup> *Id.*

<sup>4</sup> *Establishment of the Bears Ears National Monument*, Proclamation No. 9558, 82 Fed. Reg. 1139 (Jan. 5, 2017).

<sup>5</sup> Eilperin, at A3.

<sup>6</sup> See Utah Enabling Act, ch 138, § § 6-12, 28 Stat. 107 (1894), <https://archives.utah.gov/research/exhibits/Statehood/1894text.htm>.

lands within the State’s boundaries.”<sup>7</sup> Under these circumstances, it is unclear from whom the federal government supposedly “grabbed” this land.

Secretary Ryan Zinke explained at the time of President Trump’s Executive Order that he will be considering whether monuments should be “rescinded, resized, [or] modified.” When asked if the President has the power to do so unilaterally, he said it is “untested” whether the President has the unilateral power to rescind a monument but that “it’s undisputed the President has the authority to modify a monument.”<sup>8</sup>

It is apparent, in part from the President’s terminology (e.g., that Bears Ears was a federal “land grab”) and the Secretary’s description of the law, that they have been influenced by a March 2017 report written for the American Enterprise Institute by John Yoo and Todd Gaziano entitled “Presidential Authority to Revoke or Reduce National Monument Designations.” Those authors argue there that President Trump has the authority to rescind or revoke the creation of national monuments by President Obama and that the President also has the authority to reduce the size of national monuments. They also argue that the Antiquities Act only authorized, or at least that Congress only intended that it be used to designate, relatively small areas as monuments around human archeological sites.

It is beyond the scope of this memorandum to discuss the merits of particular national monument designations or the fact that President Obama established procedures to assure there was significant public outreach and input before each of his monument designations. The purpose of this memorandum is instead to address the Yoo and Gaziano arguments about the scope and nature of the monuments Congress authorized to be designated in the Antiquities Act and their arguments that a President may unilaterally rescind or materially reduce the size of a monument previously established. After evaluating the U.S. Constitution, relevant statutes and other relevant authorities, we have concluded that Yoo and Gaziano are wrong about these matters.

### **Executive Summary**

***The authority granted by the Antiquities Act is not limited to small areas around human archeological sites.***

President Trump’s Executive Order and accompanying Administration statements suggest that the “original” objective of the Antiquities Act was limited to permitting the President to set aside small areas of land around human archeological sites. Monument designations outside this constrained scope are called “abuses.” This is the view for which Yoo and Gaziano argue and this (“abuses”) is how they describe large monuments protecting natural sites. However, they base their argument - - not on the final language of the statute - - but on early bills rejected by Congress. This is a novel way to understand a statute.

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<sup>7</sup> *Id.*, § 3.

<sup>8</sup> “Press Briefing by Secretary of Interior Ryan Zinke to Review the Designations Under the Antiquities Act,” Office of the Press Secretary, White House, April 25, 2017.

In fact, in the five or six years before the Antiquities Act was adopted, there were two camps seeking such a statute, but they had different concepts of what it should authorize. Archeologists wanted a narrow statute to protect archeological sites. The Department of the Interior wanted a statute authorizing the protection of large scenic areas, this being before creation of the National Park System. In the end, all sides agreed upon compromise language that became the Antiquities Act. The compromise added a clause authorizing protection of areas having “historic or scientific interest” and provided that the monument “shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.”<sup>9</sup>

Almost immediately after the Act’s adoption, President Theodore Roosevelt established the Grand Canyon National Monument, protecting 818,000 acres, and almost immediately someone challenged the legality of that monument’s designation under the Act. But the U.S. Supreme Court rejected the challenge in *Cameron v. United States*.<sup>10</sup> Referring to the clause which formed the basis of the compromise, the Court explained that the Grand Canyon “is an object of unusual scientific interest” and went on to explain its scientific importance and natural wonders.

Every court thereafter has reached the same conclusion as to other monuments challenged as natural rather than archeological. It is not surprising that larger areas are required to protect natural wonders than the areas required to protect archeological sites. Congress provided flexibility concerning the size of each monument in order to allow for differences based on what is being protected. Referring to larger monuments as “abuses” ignores the text of the statute and the history behind its adoption.

***The President has no authority to revoke or materially reduce previously designated monuments.***

In our system of Government, Presidents have no power other than that granted to them by the U.S. Constitution or by an Act of Congress. The issue here does not invoke any power granted the President by the U.S. Constitution. The issue instead concerns administration of federally owned land, and the Constitution gives that power exclusively to Congress. U.S. Const., Property Clause, Art. IV, § 3. Whether or not the President has the power unilaterally to revoke a national monument designation therefore depends on whether that power is expressly or by implication delegated to the President by an Act of Congress. The Antiquities Act of 1906 authorizes the President to create national monuments on land owned or controlled by the federal government.<sup>11</sup> The Act says nothing about a President’s having the power to abolish a national monument or to reduce the size of a monument. The question is therefore whether such a power may be implied.

Contrary to the arguments of Yoo and Gaziano, reading a revocation power into that statute by implication would be improper. This is so for several reasons.

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<sup>9</sup> 54 U.S.C. § 320301(a) and (b).

<sup>10</sup> 252 U.S. 459 (1920).

<sup>11</sup> 54 U.S.C. § 320301(a).

First, the U.S. Attorney General opined long ago that the Antiquities Act could not be interpreted to imply that a President has the power to revoke a national monument's designation. No President has attempted to revoke such a designation since that Opinion was issued in 1938.

Second, Yoo and Gaziano fail to recognize that in the more than 100 years since the adoption of the Antiquities Act, Congress has adopted a comprehensive legislative scheme to govern federally owned land, into which the Antiquities Act was folded and in relation with which it must be interpreted. One of those statutes was the Federal Land Policy and Management Act ("FLPMA"), adopted in 1976.<sup>12</sup> Congress there in effect adopted the Attorney General's interpretation that no revocation power should be read into the Antiquities Act by implication. Thereafter, it would be particularly improper to interpret the Antiquities Act as implying that the President has the power to revoke a monument designation.

Third, as to those national monuments which were made part of the National Park System, Congress has mandated that the power to manage those special places "shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress."<sup>13</sup> Revoking the designation of such a national monument and pulling it out of the National Park System would certainly be in derogation of the reasons such special places were added to that System.

Secretary Zinke, however, stated that a President has the authority to modify a monument, and President Trump stated he is eager to modify the boundaries of Bears Ears National Monument. If they are thinking that the President would have the power to modify that monument in a material way that would undermine the protection of the resources for which it was created, they are wrong. A President does not have the power to do in part what he may not do in full. While there were some instances before 1976 of Presidents changing the boundaries of monuments, no President has attempted to do so after FLPMA was adopted.

The revocation of the designation of a national monument or the material reduction in its size, and particularly a monument that is part of the National Park System, is therefore beyond the power of a President acting without Congress. The interpretation proffered by Yoo and Gaziano would therefore, if acted upon, result in a usurpation of congressional powers by the Executive Branch.

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## **I. The Antiquities Act of 1906.**

The Nineteen Century saw substantial western expansion of the United States, and it was the federal government that acquired the land making that expansion possible. While that government had acquired land since its founding, the government substantially increased its holdings by such events as the Louisiana Purchase of 1803, the Oregon Compromise with

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<sup>12</sup> 43 U.S.C. 1704 *et seq.*

<sup>13</sup> 54 U.S.C. § 100101(b)(2).

England in 1846 and the treaty resolving the Mexican-American War in 1848.<sup>14</sup> No sooner had the public land domain been established in the Eighteenth Century than a policy of disposing of the land had been initiated.<sup>15</sup> The federal government transferred nearly 816 million acres of public domain land to private ownership and 328 million acres to the States as they became established.<sup>16</sup>

By late in the Nineteenth Century, however, demands grew to “withdraw” some public lands from that available for sale, grant or other disposition so it could be retained by the federal government for conservation and similar purposes. The first permanent federal land reservation was Yellowstone National Park, created in 1872, and in 1891 the President was given power to withdraw forest lands and prevent their disposal.<sup>17</sup> The federal government retained for the benefit of all Americans a large part of the land that government had acquired, totaling approximately 600 million acres.<sup>18</sup>

In recognition of the slow process of enacting federal legislation, Congress adopted the Antiquities Act in 1906 to empower the President to protect some of that federal land promptly. That Act, as now codified, provides:

(a) The President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.

(b) The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.<sup>19</sup>

President Theodore Roosevelt was the first to use that Act, establishing 18 national monuments, including Devil’s Tower, Muir Woods, Mount Olympus (the predecessor to Olympic National Park) and the Grand Canyon. Almost every President thereafter has designated additional national monuments. These monuments were created to provide for the enjoyment and use of the federal lands by the American people.

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<sup>14</sup> See generally “Natural Resources Land Management Act,” S. Rep. No. 94-583 (hereafter the “Senate Report”) at 27-32; Carol Hardy Vincent et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data* 5 (2014), available at <https://fas.org/sgp/crs/misc/R42346.pdf>.

<sup>15</sup> See Senate Report, at 28.

<sup>16</sup> Kristina Alexander and Ross W. Gorte, Cong. Research Serv. RL34267, *Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention* 5 (2007), available at <https://fas.org/sgp/crs/misc/RL34267.pdf>.

<sup>17</sup> 17 Stat. 326; 26 Stat. 1095.

<sup>18</sup> Alexander and Gorte, at 9.

<sup>19</sup> 54 U.S.C. § 320301(a) and (b).

## II. The President's Authority under the 1906 Act is not Limited to Protecting Small Areas Around Archeological Sites, As Yoo and Gaziano Argue and the Administration Claims.

Yoo and Gaziano argue that Congress only intended in the Antiquities Act to authorize the President to create monuments to protect small areas around human archeological sites. They concede that the Act's "final language covered more than antiquities" and that "small scenic areas" were contemplated. But they argue that "the statute's title, drafting history and historical context" should convince Presidents "to follow the text and spirit of the original law."<sup>20</sup> And they repeatedly call Presidential proclamations that did not do so "abuses." This is a novel way of understanding a statute passed by Congress, i.e., by looking to earlier versions of a bill not adopted rather than to the "final language" of the act. Contrary to these arguments, the Act by its terms and as understood by Congress at the time authorizes protection of large areas containing natural resources, and the size of the protected area depends on the resources being protected.

It is true that the national monument authority is generally referred to as the "Antiquities Act," but that is so because parts of the statute did in fact address only antiquities, such as by prohibiting their looting.<sup>21</sup> But the legislative history of the portion of the Act relating to monuments, as well as its text, makes clear that that authority was not limited to protecting antiquities. There was considerable disagreement about what became this part of the Act in the years before its adoption. There were two views: archeologists and the Smithsonian Institution wanted a law providing for the protection only of archeological sites in order to address Western legislators' concerns over the size and scope of protected areas, as Yoo and Gaziano say.<sup>22</sup> The Department of the Interior and some members of Congress, on the other hand, wanted a law that would provide protection as well for large "scenic beauties and natural wonders and curiosities".<sup>23</sup> While Yoo and Gaziano say Congress had rejected bills the Department supported, they omit the fact that bills limited as the archeologists wanted had also failed.<sup>24</sup> This process went on for 5 years. Finally, Professor Edgar Hewett drafted a compromise bill that was adopted without much further ado and became the relevant part of the Antiquities Act of 1906.<sup>25</sup>

Yoo and Gaziano rely largely on a work by Ronald Lee for their recital of the history of the Act.<sup>26</sup> Here is what he says about the final bill:

Senator Lodge's bill, in its earlier versions, had been limited to historic and prehistoric antiquities and made no provision for protecting natural areas. At some point in his

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<sup>20</sup> Yoo and Gaziano, at 3.

<sup>21</sup> See 54 U.S.C. § 32032.

<sup>22</sup> See Ronald F Lee, "The Antiquities Act, 1900-1906," in *The Story of the Antiquities Act* (National Park Service, March 15, 2016), [www.nps.gov/archeology/pubs/lee/Lee\\_CH6.htm](http://www.nps.gov/archeology/pubs/lee/Lee_CH6.htm) at 2-3.

<sup>23</sup> *Id.*, at 3.

<sup>24</sup> *Id.*, at 4-6.

<sup>25</sup> *Id.*, at 7.

<sup>26</sup> Yoo and Gaziano, at nn. 3, 5, 6 and 8.

discussions with government departments, Hewett was persuaded, probably by officials of the Interior Department, to broaden his draft to include the phrase “other objects of historic or scientific interest.” ... As it later turned out, the single word “scientific” in the Antiquities Act proved sufficient basis to establish ... national monuments preserving many kinds of natural areas, ...<sup>27</sup>

One of the first monuments to be designated under that Act was President Theodore Roosevelt’s 1908 creation of Grand Canyon National Monument, which covered 818,000 acres.<sup>28</sup> The holder of a mining claim to land on the south rim of the Canyon challenged the legality of the monument designation because it supposedly exceeded the President’s power under the Antiquities Act. In *Cameron v. United States*, the Court rejected that argument.<sup>29</sup> The mining claim, the Court explained, included the trailhead of the famous Bright Angel Trail “over which visitors descend to and ascend from the bottom of the canyon.”<sup>30</sup>

The act under which the President proceeded empowered him to establish reserves embracing “objects of historic or scientific interest.” The Grand Canyon, as stated in his proclamation, “is an object of unusual scientific interest.” It is the greatest eroded canyon in the United States, if not the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.<sup>31</sup>

In 1976, the Supreme Court again was called on to address this issue and again explained that the Antiquities Act is not limited to archeological areas. In *Caepfert v. United States*, the Court upheld President Truman’s creation of a national monument at Devil’s Hole, Nevada, as a habitat for a species of fish found only there. The fish, said the Court, were “objects of historic or scientific interest” within the meaning of that clause in the Antiquities Act.<sup>32</sup> Similarly, when President Carter designated several national monuments in Alaska based in part on their natural resources, opponents challenged the designations in court, making the same arguments about the supposedly constrained nature of places that could be so designated. The district court resoundingly rejected those arguments, based in part on *Cameron* and *Caepfert* as well as on the court’s analysis of the Act’s legislative history.<sup>33</sup> Reciting the same legislative history discussed above, the court found that Mr. Hewett’s compromise bill, which contained the clause “other objects of historic or scientific interest” and which had become law, “was indeed intended to enlarge the authority of the President.” Moreover, the court concluded that “matters of scientific

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<sup>27</sup> Lee, at 9.

<sup>28</sup> *Establishment of Grand Canyon National Monument*, Proclamation No. 794, 35 Stat. 2175 (1908).

<sup>29</sup> 252 U.S. 459 (1920). President Roosevelt also designated the 60,000 acre Petrified Forest National Monument in 1906, the 10,000 Chaco Canyon National Monument in 1907 and the almost 640,000 acre Mount Olympus National Monument in 1909. See Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. Rev. 473, 490 n. 92 (2003).

<sup>30</sup> 252 U.S. at 455 and n.1.

<sup>31</sup> *Id.*, at 455-56.

<sup>32</sup> 426 U.S. 128, 141-42 (1976).

<sup>33</sup> *Anaconda Copper Co. v. Andrus*, No. A79-161, civil, 14 ERC 1853 (D, Alaska July 1, 1980).

interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act.”<sup>34</sup>

The Administration’s claims that large monuments are “abuses” of the Antiquities Act and that it was only intended to apply to small areas are simply wrong. In setting limits on the size of areas to be protected, the Act merely imposed the requirement that the president designate the “smallest area compatible with the proper care and management of the objects to be protected.” From the very beginning, that Act was used to protect large areas such as the Grand Canyon and Mount Olympus, which later became Olympic National Park. It is obvious that more land is needed to protect natural resources such as these areas than to protect isolated archeological sites. It is therefore simply not true that the areas protected under the Act in its early years were limited to small areas of a few hundred acres.

### **III. The President Has No Implied Power to Revoke a National Monument Created under the Antiquities Act.**

Because the Antiquities Act does not expressly empower or prohibit Presidents to revoke national monuments, proponents of such a power argue that that power may be read into the Act by implication. Gaziano and Yoo and some members of Congress argue that the President has many implied powers and that this is merely one such power. They are wrong.

Yoo and Gaziano argue for a general proposition that “the authority to execute a discretionary government power usually includes the power to revoke it -- unless the original grant expressly limits the power of revocation.”<sup>35</sup> They argue that this supposedly follows from the principle that each “branch of government can reverse its earlier actions using the same process originally used.”<sup>36</sup> They point to the President’s power to fire Executive Branch officials even after the Senate has confirmed the appointment and to the President’s power over foreign treaties. The problem with that argument is that it ignores the source of the original power. There is no government-wide general rule on this subject; each source of power must be examined to assess whether a power to revoke previous actions should be implied. As former President and Supreme Court Chief Justice Taft stated:

The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to *some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise*. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof.<sup>37</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> Yoo and Gaziano, at 7.

<sup>36</sup> *Id.*, at 8.

<sup>37</sup> William Howard Taft, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1916), available at <https://archive.org/stream/ourchiefmagistra00taftuoft#page/n5/mode/2up> (*emphasis added*).



Accordingly, when Yoo and Gaziano point to the power of the President to fire Executive Branch officers and to revoke treaties with foreign governments, they are pointing to powers found in the Constitution's grant of executive authority to the President. The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const., Art. II, § 1. It is reasonable to conclude that that broad grant includes the power to revoke what has been done. As Justice Taft explained:

The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist.<sup>38</sup>

The same may be said of specific powers granted the President, including that to make treaties with foreign countries. *See* U.S. Const., Art. II, § 2.

But here we are not dealing with the scope of the powers granted the Executive Branch under the Constitution. Here, we are dealing instead with the power over federal lands, and the Constitution grants that power, not to the President, but exclusively to the Congress. The Property Clause of the Constitution provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ...." *Id.*, Art. IV, § 3, Cl. 2.

For the President to have the power to revoke a monument designation under the Antiquities Act, therefore, the issue is whether that Act of Congress, not the Constitution's grant of the executive power to the President, may be interpreted to imply the unstated power to revoke a monument designation thereunder.<sup>39</sup>

This is a question on which the Attorney General of the United States, Homer S. Cummings, ruled in the negative.<sup>40</sup> In 1938, President Franklin Roosevelt asked Attorney General Cummings for a formal Legal Opinion as to whether the President could rescind former President Coolidge's designation of the Castle Pinckney National Monument under the Antiquities Act. After careful study, Attorney General Cummings explained that the answer was "no."

A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative

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<sup>38</sup> *Id.*

<sup>39</sup> Yoo and Gaziano also argue as an analogy that the Executive Branch has the power to repeal regulations adopted under discretionary statutory authority. But that authority is recognized, in the words of Justice Taft, as "included within such express grant as proper and necessary to its exercise." *Id.* That says nothing about whether such implied power should also be implied in the Antiquities Act.

<sup>40</sup> Attorney General Cummings held a PhD and law degree from Yale University. He served from 1933 until 1939. (*See* U.S. Department of Justice, *Attorneys General of the United States*, at <https://www.justice.gov/ag/bio/cummings-homer-still>)

sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.<sup>41</sup>

The Attorney General’s Opinion explained that under long-standing precedent “if public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation.”<sup>42</sup> Since the Cummings Opinion, no President has attempted unilaterally to rescind a national monument.<sup>43</sup> Rather, as contemplated by the Cummings Opinion, when some monuments have been abolished, it has been Congress that has done so by legislation.<sup>44</sup>

Yoo and Gaziano argue that the Cummings Opinion was “poorly reasoned” and “erroneous as a matter of law.”<sup>45</sup> But their description of that opinion is not a fair characterization of Attorney General Cumming’s reasoning. For example, they claim he found binding an 1862 opinion when he merely relied on its reasoning and they then describe that earlier opinion unfairly. But what Cummings found significant about that earlier case is that, as in the case of the Antiquities Act, the statute in question had authorized the President to reserve lands but had said nothing about his power to undo the reservation made. And the earlier Attorney General had concluded that such power could not be implied. In reaching the same conclusion as to the Antiquities Act, Attorney General Cummings distinguished statutes that expressly authorize the President to revoke reservations.

The gaping hole in the Yoo and Gaziano arguments, however, is that they ignore or minimize the importance of the fact that, since 1906, Congress has adopted a comprehensive system of laws to govern federally-owned lands, and that the Antiquities Act must be understood and interpreted as part of that legal structure. Statutes covering the same subject matter are interpreted together. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000). Two particular later statutes are relevant here. First, in 1976, Congress adopted the Federal Land Policy and Management Act (“FLPMA”).<sup>46</sup> Second, in 1916,

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<sup>41</sup> “Proposed Abolishment of Castle Pinckney Nat’l Monument,” 39 Op. Atty. Gen. 185, 185 (1938), *citing* Opinion by Attorney General Edward Bates to the Secretary of the Interior, 10 U.S. Op. Atty. Gen. 359 (1862). As a general matter, opinions of the Attorney General are binding on the Executive Branch offices that request them until they are overruled or withdrawn. *See Pub. Citizen v. Burke*, 655 F. Supp. 318, 321–22 (D.D.C. 1987) (“As interpreted by the courts, an Attorney General’s opinion is binding as a matter of law on those who request it until withdrawn by the Attorney General or overruled by the courts.” (citation and internal quotations omitted)), *aff’d*, 843 F.2d 1473 (D.C. Cir. 1988); *cf.* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1472, 1482–84 (2010).

<sup>42</sup> 39 Op. Atty. Gen. at 186–87.

<sup>43</sup> Squillace, at 553.

<sup>44</sup> Congress has abolished a number of National Monuments by legislation. *See, e.g.*, Wheeler National Monument in 1950 (64 Stat. 405); Shoshone Cavern in 1954 (68 Stat. 98); Papago Saguaro in 1930 (46 Stat. 142); Old Kasaan in 1955 (69 Stat. 380); Fossil Cyad in 1956 (70 Stat. 898); Castle Pinkney in 1956 (70 Stat. 61); Father Millet Cross in 1949 (63 Stat. 691); Holy Cross in 1950 (64 Stat. 404); Verendrye in 1956 (70 Stat. 730), and Santa Rosa Island in 1946 (60 Stat. 712).

<sup>45</sup> Yoo and Gaziano, at 5.

<sup>46</sup> 43 U.S.C. 1704 *et seq.*

Congress adopted the National Park System Organic Act, to which Congress added significant provisions in 1970 and 1978.

When FLPMA was adopted in 1976, Congress legislated against the backdrop of the Antiquities Act providing that the President could create national monuments and the Cummings Opinion that the President could not revoke national monuments. There is evidence that Congress was aware of the Cummins Opinion, which was reported in one of the studies leading to FLPMA's passage.<sup>47</sup> But in any event, when Congress legislates on a subject, "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning."<sup>48</sup> Yet in FLPMA, Congress did not "affirmatively act[] to change the meaning" of the Antiquities Act as interpreted by the Cummings Opinion. Congress therefore in effect adopted that interpretation.

Moreover, the Supreme Court has made clear that, to harmonize different statutes, "a specific policy embodied in a later federal statute should control our construction of [a prior one], even though it had not been expressly amended."<sup>49</sup> This is particularly so when the later statute is a comprehensive legislative scheme.<sup>50</sup> FLPMA was the very sort of "comprehensive legislative scheme" that requires interpreting the Antiquities Act to harmonize with FLPMA. It would not be harmonious with FLPMA to read into the Antiquities Act an implied authorization for a President to revoke a prior monument's designation because in FLPMA, one of Congress' purposes was to reassert its own authority over federal land withdrawals and to limit to express delegations the authority of the Executive Branch in this regard.

FLPMA was the result of a years-long re-examination and reorganization of laws governing management of federal lands, including the creation of reservations or "withdrawals" of land for particular purposes.<sup>51</sup> In 1964, Congress had created The Public Land Law Review Commission to undertake that reexamination, finding in part that there were many statutes governing federal lands "which are not fully correlated with each other."<sup>52</sup> The Commission obtained extensive studies and finally issued its report in 1970.<sup>53</sup> One of its recommendations was that "[d]elegations of the congressional authority should be specific, not implied, ...."

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<sup>47</sup> See Charles F. Wheatley, Jr., "Study of Withdrawals and Reservations of Public Domain Lands" (Public Land Law Review Commission 1969), at 17, 264.

<sup>48</sup> *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 822 (11th Cir. 1998) (addressing legislative action after earlier Attorney General interpretation); see also, to the same effect, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 and n.66 (1982) (considering whether rights should be implied under a statute); *Souter v. Jones*, 395 F.3d 577, 598 (6th Cir. 2005).

<sup>49</sup> See *United States v. Romani*, 523 U.S. 517 (1998).

<sup>50</sup> See *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981); see also *Hi-Lex Controls Inc. v. Blue Cross*, 2013 WL 228097 (E.D. Mich. Jan. 22, 2013) at \*3.

<sup>51</sup> Pub. Law No. 94-579, codified at 43 U.S.C. § 43 U.S.C. § 1701 *et seq.* As the Senate Report accompanying the bill that became FLPMA explained, Congress had long recognized "a need to review and reassess the entire body of law governing Federal lands." Senate Report, at 34.

<sup>52</sup> See 78 Stat. 982 (Sept. 19, 1964).

<sup>53</sup> Public Land Law Review Commission, "One Third of the Nation's Land: A Report to the President and the Congress" (1970); see also Senate Report, at 32-36.

Congress followed that recommendation, declaring in FLPMA that “it is the policy of the United States that ... the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action.”<sup>54</sup> Accordingly, Congress expressly repealed a large number of statutes previously authorizing the Executive Branch to make withdrawals of federal land and overturned a court decision implying such power.<sup>55</sup> But FLPMA did not repeal the Antiquities Act. This was no oversight; the decision to leave that Act in effect was noted in the House Report.<sup>56</sup> And while Congress gave the Secretary of the Interior some powers to make, modify or revoke withdrawals, FLPMA provided that the Secretary did not have power to “revoke or modify” any Antiquities Act monument designation.<sup>57</sup>

The House Report made clear that there were to be no more implied powers to withdraw lands or to revoke previous withdrawals; only Congress was to have those powers except as expressly delegated.

With certain exceptions [including under the Antiquities Act], H.R. 13777 will repeal all existing law relating to executive authority to create, modify, and terminate withdrawal and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, .... *It would also specially reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act ....* These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.”<sup>58</sup>

Specifically as to national monuments, therefore, just as Attorney General Cummings concluded, while the President would continue to have the power to establish national monuments under that Act, only Congress would be empowered to revoke a monuments designation. Any other understanding of the Antiquities Act would be contrary to Congress’

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<sup>54</sup> *Id.*, codified at 43 U.S.C. § 1704(a)(4).

<sup>55</sup> See Pub. Law No. 74-597, § 704 (“Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.*, 236 U.S. 459) and the following statutes and parts of statutes are repealed: ...”).

<sup>56</sup> “The exceptions, which are not repealed, are contained in the Antiquities Act (national monuments), ....” House Report, at 29.

<sup>57</sup> 43 U.S.C. §1714 and § 1714(j). Those sections speak in terms of the authority of the Secretary of the Interior to make, modify or revoke withdrawals, but it is relevant to note in understanding that section that at the time of FLPMA’s adoption, the President had delegated to the Secretary of the Interior all of the President’s “authority ... vested in him to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States in the continental United States or Alaska for public purposes, including authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made.” *Delegating to the Secretary of the Interior the Authority of the President to Withdraw or Reserve Lands of the United States for Public Purposes*, Exec. Order 10355, 17 Fed. Reg. 4831 (May 28, 1952); Wheatley, at 379 (that Executive Order, as of 1969, “is now the controlling authority”).

<sup>58</sup> House Report, at 9 (*emphasis added*).

purpose and comprehensive legislative scheme in FLPMA to eliminate all implied delegations of authority to the Executive Branch to withdraw or revoke withdrawals.

Yoo and Gaziano nevertheless suggest that a President could revoke a prior designation if the later President determines it was based on a factual error, is no longer a valid designation due to changed circumstances, or is “illegally or inappropriately large.”<sup>59</sup> But there already exists a remedy under such circumstances; those same arguments can be made to Congress.<sup>60</sup>

The conclusion that only Congress may revoke a national monument designation applies doubly to those national monuments created under the Antiquities Act and administered by the National Park Service (“NPS”).<sup>61</sup> Ten years after adoption of the Antiquities Act, Congress adopted the Organic Act of 1916 creating the National Park System.<sup>62</sup> Congress there mandated that the fundamental purpose of the System is to “conserve the scenery, natural and historic objects, and the wild life in the System units ... [and ] leave them unimpaired for the enjoyment of future generations.”<sup>63</sup> In 1970, Congress adopted amendments to that Organic Act which made clear that national monuments administered by NPS are part of that System and are to be protected as such.<sup>64</sup> And Congress provided that the entire National Park System is a “cumulative expression[] of a single national heritage.”<sup>65</sup> In 1978, not satisfied that the Executive Branch had gotten the message, Congress returned to this subject and added the mandate that

the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, *except as directly and specifically provided by Congress.*<sup>66</sup>

Congress clearly did not intend that a President could unilaterally revoke the designation of a national monument that is part of the National Park System without Congress’ directly and

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<sup>59</sup> Yoo and Gaziano, at 9, 10.

<sup>60</sup> As described in noted 4 above, on several occasions Congress has abolished national monuments by legislation.

<sup>61</sup> For example, recent Proclamations establishing national monuments as part of the National Park System have provided “The Secretary of the Interior (Secretary) shall manage the monument through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation.” *Establishment of the Belmont-Paul Women’s Equality National Monument*, Proclamation No. 9423, 81 Fed. Reg. 22505 (Apr. 15, 2016).

<sup>62</sup> Now codified at 54 U.S.C. §100101(a).

<sup>63</sup> *Id.*

<sup>64</sup> See Pub. L. No. 91-383 (National Park System General Authorities Act), codified in this regard at 54 U.S.C. §§ 100102(2), 100501 (defining “National Park System” to include any area administered by the Director of NPS, including for “monument” purposes). Those monuments are as fully covered by general regulations protecting the entire System as are any national parks created by Congress. See 36 C.F.R. §1.2 (NPS regulations apply to federally owned land administered by NPS).

<sup>65</sup> 54 U.S.C. § 100101(b)(1)(B).

<sup>66</sup> *Id.*, § 100101(b)(2) (*emphasis added*).

specifically so providing. Such an act would certainly be in derogation of the values and purposes for which the monument had previously been established.<sup>67</sup>

All of this simply goes further to establish that in the 1970s Congress adopted the Cummins Opinion's conclusion that no President may unilaterally revoke the establishment of any national monument. Such a revocation would require an act of Congress.

#### **IV. For the Same Reasons, No President May Unilaterally Materially Reduce the Size of a National Monument.**

President Trump's Executive Order of April 26, 2017 and Secretary Zinke's comments also raise the issue whether a President may unilaterally reduce the size of a national monument. Yoo and Gaziano argue that that power is to be implied into the Antiquities Act even if the President does not have the power to revoke a monument's designation.<sup>68</sup> But there is no merit to this claim, which is simply an alternative formulation of the baseless argument that a President may unilaterally abolish a national monument. Any attempts by the President to remove land or features that would undermine the purposes and values for which the monument was originally created would be a partial revocation of the monument. The President does not have the power to do in part what he cannot do in full.

Yoo and Gaziano rely on the fact that Presidents have issued a handful of proclamations that reduced the size of some national monuments. Whatever the understanding of this power might have been before the 1970s legislation discussed above, however, they cite not one example of any such reduction after FLPMA was adopted in 1976. The last time such a thing happened was in 1963, when President Kennedy issued a Proclamation to remove certain lands from Bandelier National Monument in New Mexico.<sup>69</sup> In FLPMA, Congress reasserted its authority over such matters. As discussed above, Congress made clear that it was "specially reserv[ing] to the Congress *the authority to modify* and revoke withdrawals for national monuments created under the Antiquities Act."<sup>70</sup>

It is unclear whether a President could make non-material adjustments to monument boundaries without congressional authorization. But President Trump does not appear to be planning to test that question when he says he is eager to change the boundaries of Bears Ears National Monument. It is at least clear that any reduction in the size of the monument or other modification that undermines the purpose and values for which it was created could be made only by Congress.

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<sup>67</sup> For example, the Presidential Proclamation designating Bears Ears National Monument explains that it is intended to preserve features of the lands that are sacred to Native Americans, paleontological resources, and a wide variety of vegetation. *Establishment of the Bears Ears National Monument*, Proclamation No. 9558, 83 Fed. Reg. 1139 (Jan. 5, 2017).

<sup>68</sup> Yoo and Gaziano, at 14-17.

<sup>69</sup> *Revising the Boundaries of the Bandelier National Monument*, Proclamation No. 3539, 28 Fed. Reg. 5407 (May 27, 1963).

<sup>70</sup> House Report, at 9 (*emphasis added*).

## **V. Conclusion.**

For over one hundred years, the Antiquities Act has allowed Presidents to create national monuments and preserve worthy lands for the enjoyment of all Americans and future generations. There are today national monuments in 31 states. For all Americans, they offer recreational opportunities and preserve a heritage of beauty, scientific marvels, and human achievement. But the Antiquities Act and subsequent legislation reserved to Congress, which has Constitutional authority over public lands, the sole power to revoke such a designation or materially to reduce the monument's size.

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